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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

STEPHANIE BANKS,

Defendant and Appellant.

F073608

(Super. Ct. No. BF162474A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Brian M. McNamara, Judge.

William G. Holzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Paul E. O'Connor, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

At the conclusion of a jury trial, defendant Stephanie Banks was convicted of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1); count 1),¹ domestic violence (§ 273.5, subd. (a); count 2), and obstructing a peace officer (§ 148, subd. (a)(1); count 3). The jury also found true enhancements alleging that Banks personally inflicted great bodily injury (§ 12022.7, subd. (e)) on the victim in counts 1 and 2, and personally used a weapon in count 2 (§ 12022, subd. (b)(1)). In a bifurcated proceeding, the trial court found true allegations that Banks had a prior serious felony conviction (§ 667, subd. (a)) and a prior strike within the meaning of the three strikes law (§§ 667, subds. (c)-(j) & 1170.12, subds. (a)-(e)), both based on a prior conviction for robbery (§ 212.5, subd. (b)).

On April 14, 2016, the trial court denied Banks's motion for a new trial. The court exercised its discretion to strike the prior strike and sentenced Banks to prison for the mitigated term of two years for assault with a deadly weapon. The court added consecutive sentences of four years for the great bodily injury enhancement and five years for the prior serious felony conviction. The court stayed Banks's sentence for the corporal injury conviction pursuant to section 654. Banks's total prison term is eleven years.

On appeal, Banks contends her trial counsel was ineffective for failing to impeach the victim with prior acts of moral turpitude and failing to object to evidence of Banks's prior robbery conviction. Banks further contends the trial court erred in denying her new trial motion which was based on a false statement made by the victim. Banks argues the false statement called into question the victim's veracity at trial. On October 10, 2018, in an unpublished opinion (*People v. Banks* (Oct. 10, 2018, F073608)), we rejected Banks's contentions and affirmed the judgment.

¹ Unless otherwise designated, all statutory references are to the Penal Code.

Banks filed a petition for rehearing seeking remand for the trial court to exercise its newly-afforded discretion to strike Banks's prior serious felony enhancement pursuant to recent amendments to section 667, subdivision (a) and section 1385, subdivision (b). On October 25, 2018, we vacated our opinion and granted rehearing. Following briefing by Banks and a concession from the People that the recent amendments apply retroactively to cases not yet final, we conclude Banks is entitled to remand for the trial court to consider striking her prior serious felony enhancement. We otherwise affirm the judgment.

FACTS

Prosecution Case

On July 5, 2015,² Banks and Gustavo C. (Gustavo) had been in a romantic relationship for six years and were living together. At about 2:00 a.m. on July 5th, the two met and talked as they walked for five hours until 7:00 a.m. During the conversation, Gustavo told Banks that she looked very tired, like she had not been sleeping, and had been partying with her friends for two or three weeks. Banks agreed. They stopped at a store where Gustavo bought a soda for himself and a beer for Banks.

Gustavo told Banks he loved her very much but did not like her out on the streets. When Gustavo had told Banks in the past to go home to get sleep, she just asked him for money. As they were walking toward an alley, Gustavo told Banks to go home. She became upset. Gustavo told her he was tired of her behavior, did not want to go on, and wanted to end their relationship. Banks complained about an incident the previous day when she claimed Gustavo hit her nose with the palm of his hand. Gustavo explained that he did not hit Banks's face or touch her body; he only touched a fence with his hand and the fence touched Banks's face. Gustavo was not trying to cause Banks's face to touch or hit the fence.

² Undesignated references to dates are to dates in 2015.

Gustavo thought Banks was still angry over the fence incident because she texted him that she would have relationships with other men, which made Gustavo feel bad. After Gustavo told Banks he wanted to end their relationship, Banks pulled a knife from a bag, wished him good luck, and stabbed him in the left chest. Gustavo tried to grab Banks's hand so she would not stab him anymore. He also used an orange safety cone in the alley to defend himself from Banks's attack. Although Gustavo was able to grab Banks's hand, she threw him to the ground because she is very strong. Banks then stabbed Gustavo twice in the back and once in the hand before running away. Gustavo briefly followed her, then yelled for an ambulance.

On cross-examination, Gustavo denied having been in a physical altercation with Banks the day before he was stabbed or right before he was stabbed. Gustavo denied ever "touching" Banks.

Bakersfield Police Officer Marc Lugo was flagged down at the scene of the stabbing at 9:26 a.m.³ Lugo could see Gustavo had suffered trauma. A witness, A.S., pointed to Banks and told Lugo Banks was the person who stabbed Gustavo. Banks and Gustavo were both walking in a westbound direction and Banks was 10 to 12 feet away from Gustavo.

As Lugo walked toward Banks, she turned around, saw him, and began running. Lugo shouted to Banks at least twice that he was a police officer and told her to stop running. When Banks failed to stop, Lugo chased her. When Lugo caught up to within an arm's reach of Banks, she put her hands in the air and Lugo handcuffed her. Lugo noted Banks had a small laceration over her left eyebrow with reddening of the whites of her eyes. There were no injuries to her neck or to her lips.

³ Another officer found a knife in the backyard of a house adjoining the alley. Banks denied the knife that was found was the one she used to stab Gustavo.

Paramedic Lawrence Mundschau arrived at the scene and attended to Gustavo. Gustavo had a stab wound to his left armpit and two wounds to his back. He also had a small laceration to his face, a wound to one of his hands, and bruises on his knuckles.

Defense Case

Banks testified that she ended her relationship with Gustavo on June 26 or 27. She had moved to a new location on the other side of town. Banks admitted she was doing drugs with Gustavo but said that when she saw him, all he wanted to do was take drugs. On the 26th, they had a drink and had sex. The next morning while Banks was asleep, she awoke to Gustavo forcibly having anal sex with her. Banks pushed him against the wall and asked him what he was doing. According to Banks, when Gustavo claimed he was doing nothing to her, she replied, “ ‘the fuck you are,’ ” and threatened to call the police.

On June 27, Banks sent Gustavo a text message thanking him for everything but informing him she had met someone else. Banks wanted to end their relationship. The entire conversation between Banks and Gustavo on July 5 was about Banks’s text message. Gustavo turned on his phone and read the text message to her. Banks explained that during the six years they were together, they spoke English and that Gustavo’s English was very good. Gustavo was extremely upset with Banks. Banks said that “[w]hen Gustavo gets pissed off, he goes in [a] rage.” Gustavo previously had hit Banks with his hands and thrown food at her.

Banks said Gustavo “busted” her lip about a week before, prior to the sex incident. Banks left the store and walked down the alley toward a bus stop. She was not sure where Gustavo was. Banks never made it to the bus stop because Gustavo came up behind her and grabbed her with his arm around her neck. Banks started screaming. Banks was holding her purse tightly because she said Gustavo used to snatch it from her. Banks explained she started “dazing off,” saw black dots all over the place, and thought Gustavo was trying to kill her. Banks reached into her purse and got her knife. Banks

was unconscious for a minute and could not remember if she fell to the ground. She saw Gustavo pick up an old, round sink. Thinking he was about to kill her, Banks stabbed Gustavo. As she did so, Gustavo hit her over the head with the sink and she fell to the ground. Banks explained the object Gustavo hit her with was fiberglass and the blow caused an injury to her head just above her left eye.

Banks denied seeing Lugo or intentionally running away from him. When Banks heard people telling her to stop running, she thought it was Gustavo and A.S. Banks said she was a loner and A.S. was not her friend. Banks told Lugo she feared for her life and was trying to protect herself.

Banks admitted she had conversations from jail with her daughter-in-law, but denied asking her to tell Gustavo not to come to court. A recording and transcript of this conversation show that Banks was worried she could go to prison for 19 years and although she had an offer of much less time, she was going to trial. Banks told her daughter-in-law that she needed her to see certain people, she was not using their names, and “you let him know point blank not to go to court, ok?” During cross-examination, Banks was uncertain if she was referring to Gustavo. During the conversation from jail, Banks told her daughter-in-law that she just got tired, and “he [Gustavo] came at me at the wrong time” During the conversation, Banks said nothing about being choked by Gustavo. Banks admitted she had been convicted of theft in 2013 and prostitution in 2015, although Banks denied her guilt for the prostitution conviction.

Banks denied stabbing Gustavo prior to this incident. Banks conceded that she always carried a knife in her purse. Defense counsel objected when the prosecutor asked her if she ever had occasion to pull the knife out quickly. The trial court overruled the objection. Banks admitted she had to pull a knife on someone in the past. When the prosecutor asked Banks if she ever stabbed anyone before, she replied that she did when she was young. Defense counsel objected to the question but the trial court sustained the objection only on the basis of the form of the question. The prosecutor argued the

question was valid on the question of defendant's character under Evidence Code section 1103. The court asked the prosecutor to rephrase the question.

The prosecutor asked Banks how the prior incident began. She replied that she was committing a crime. When the prosecutor asked Banks to elaborate on the details, defense counsel objected on the ground the question called for a narrative. The trial court overruled the objection, stating that they had "to get something. I'll overrule." Banks admitted that when she was 18 years old, she stabbed a clerk during a robbery and she was not acting in self-defense. Banks denied stabbing anyone else and being in fights explaining that she was not a physical person.

A.S. lived in a house adjacent to the alley. He heard an argument between a male and a female and saw Gustavo aggressively grabbing at Banks. It appeared to A.S. that Banks was trying to get away from Gustavo, who was reaching out toward her. A.S. heard Gustavo mention "dinero," the Spanish word for money, and thought Gustavo was asking Banks for money. A.S. initially grabbed Gustavo because he appeared to be more aggressive, but quickly discerned Gustavo's posture was defensive. A.S. did not see Gustavo hit Banks. A.S. described Gustavo as "pretty irate." A.S. then realized Gustavo was injured because he saw that Gustavo was bleeding. Gustavo told A.S. he had been stabbed and pointed to Banks. Gustavo said he showed A.S. the stab wound on his chest.

A.S. got a milk crate from his yard for Gustavo to sit on. He did not see either Gustavo or Banks with a weapon or holding or throwing any objects with their hands. Banks had a purse. A.S. did not see Gustavo holding a kitchen sink. A.S. said he had known Banks for years and that she knew him as well.

It took Lugo, who was in uniform, about five minutes to arrive at the scene in a marked patrol vehicle. A.S. heard Lugo tell Banks to stop, but did not hear him identify himself as a police officer. A defense investigator testified that A.S. told him Banks had told A.S. on July 5 that Gustavo tried to rape her near the store. A.S. told the investigator he heard Gustavo and Banks fighting one another.

Gustavo was recalled as a defense witness and denied trying to hit Banks or to take the knife from her. He only tried to grab Banks so she could not stab him. Gustavo reiterated his earlier testimony that Banks stabbed him in the chest and twice in the back.

Rebuttal

Lugo was recalled and explained he saw no injuries to Banks's neck. Banks exhibited no other signs of having been choked such as complex marks on the neck, difficulty swallowing, or a hoarse voice. Lugo interrogated Banks after she was advised of and had waived her rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436.⁴

The knife found at the scene was shown to Banks during questioning and she identified it as being belonging to her. A picture of the knife was published to the jury. When Lugo specifically asked Banks if she lost consciousness, she said she had not and mentioned nothing about seeing black dots. Banks did not mention anything about the sink when questioned by Lugo. A picture of the sink was shown to the jury. The sink was five feet away from where Lugo questioned Banks at the scene. Lugo described the object as plastic and being very light, weighing about one and a half pounds. It was not ceramic or heavy.

A recording of Lugo's questioning of Banks was played for the jury. Banks told Lugo that Gustavo dropped his backpack in the alley and grabbed her from behind by the neck. Gustavo cussed at Banks and hit her in the face, cutting her over her left eye. Banks pulled out a knife from her purse. Banks gave Gustavo a warning and he tried to grab the knife from her hand. The two were tussling with Gustavo turning Banks's hands to release the knife. Once Gustavo was holding her hand, the knife went into him twice. Although Banks initially denied stabbing Gustavo, she admitted that she stabbed his back after he hit her face. Banks was asked if she lost consciousness but replied that Gustavo

⁴ Transcripts of the interview and of two recordings of jail conversations were also made part of the record.

had his arm around her neck. Toward the end of the interview, Banks said that Gustavo hit her with the white sink. Banks said she stabbed Gustavo in the back when he tried to pick up the sink.

A recording of a jail conversation was also played for the jury in which Banks did not mention being choked. The parties stipulated that Banks had convictions for petty theft and prostitution.

DISCUSSION

Alleged Ineffective Assistance of Counsel

Introduction

Gustavo had a misdemeanor conviction for theft in 2010, two such convictions in 2013, and a misdemeanor burglary conviction in 2014. During motions in limine, the trial court ruled that defense counsel could impeach Gustavo with the convictions in 2013 and 2014, but not with the 2010 conviction. During cross-examination of Gustavo at trial, however, defense counsel did not impeach him with his prior acts of moral turpitude.

During her testimony, Banks testified that Gustavo had busted her lip, was prone to rages, and had sodomized her without her consent. In so testifying, Banks opened the door for the prosecutor to introduce similar evidence about Banks pursuant to Evidence Code section 1103, subdivision (b) which the prosecutor did when he asked Banks about the robbery she committed as an 18 year old that included stabbing the victim. Banks argues her trial counsel was ineffective for failing to object to this line of questioning because the prejudice to Banks outweighed its probative value under Evidence Code section 352.⁵

⁵ The People's motion in limine sought to impeach Banks if she chose to testify with her five prior misdemeanor convictions between 2004 and 2013 for prostitution, theft, and stealing or taking a vehicle. The prosecutor added a 2015 conviction for prostitution to its motion. Defense counsel objected to the inclusion of the 2015 conviction as overkill. The court ruled that Banks could be impeached with her

Banks contends her case pivoted on credibility because she and Gustavo gave differing accounts of the events leading up to the stabbing. Banks argues her trial counsel was ineffective for failing to impeach Gustavo with his two prior convictions. She further argues her trial counsel was ineffective for failing to object to the prosecutor's impeachment of her with her conviction for robbery at age 18 during which she stabbed the victim. We find a tactical basis for defense counsel's choices at trial and further that, even if defense counsel was ineffective, Banks has failed to demonstrate prejudice.

Appellate Review of Assertions of Ineffective Assistance of Counsel

A defendant has the burden of proving ineffective assistance of trial counsel. To prevail on a claim of ineffective assistance of trial counsel, the defendant must establish not only deficient performance, which is performance below an objective standard of reasonableness, but also prejudice. Prejudice is shown when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*Williams v. Taylor* (2000) 529 U.S. 362, 391, 394; *In re Hardy* (2007) 41 Cal.4th 977, 1018 (*Hardy*).) A reasonable probability is one sufficient to undermine confidence in the outcome. The question is not one of outcome determination, but whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. (*Hardy, supra*, 41 Cal.4th at p. 1018.)

There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Tactical errors are generally not deemed reversible. Counsel's decisionmaking is evaluated in the context of the available facts. To the extent the record fails to disclose why counsel acted or failed to act in the manner challenged, appellate courts will affirm the judgment unless counsel was asked for an explanation and failed to provide one, or there could be no satisfactory explanation. Prejudice must be

misdemeanor convictions for theft in 2013 and prostitution in 2015. The parties also filed written stipulations that Banks could be impeached with these two prior convictions.

affirmatively proved. The record must affirmatively demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*People v. Maury* (2003) 30 Cal.4th 342, 389.) Attorneys are not expected to engage in tactics or to file motions that are futile. (*People v. Price* (1991) 1 Cal.4th 324, 386-387.)

On direct appeal, reversal of a conviction for ineffective assistance of counsel will only occur if: (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there could be no satisfactory explanation for counsel's choices. All other claims of ineffective assistance of counsel are more appropriately resolved in a habeas corpus proceeding. (*People v. Mai* (2013) 57 Cal.4th 986, 1009.)

Counsel's Trial Tactics

Banks argues her trial counsel was ineffective because there was no tactical reason for him not to impeach the primary witness against her with his two prior theft convictions. She further argues her counsel was ineffective for failing to object on Evidence Code section 352 grounds to her prior conviction for robbery. Banks contends that these shortcomings were prejudicial to her case.

Banks's argument relies on *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1523-1524 (*Lopez*) which found a defense attorney's failure to prevent the improper impeachment of defense witnesses was ineffective representation and prejudicial to the outcome of the defendant's case. Among the charges against Lopez was that he resisted performance of executive officers' duties by means of force or violence and obstructed peace officers in the discharge of their official duties. (*Id.* at pp. 1516-1519.) A husband, wife, and their son were independent witnesses of Lopez's arrest. The husband was impeached with a battery conviction years before and giving a false name to a police officer. His wife had a prior misdemeanor conviction. Their son had been arrested a month before trial and had committed an assault and battery in another jurisdiction a year

earlier. Lopez's wife had a conviction for forgery and other arrests, including for driving without a license. Her arrest for driving with a license was the only offense used for impeachment to which the defense objected. (*Id.* at p. 1520.) The prosecutor used these arrests and convictions to attack the credibility of the defense witnesses in closing argument. (*Id.* at p. 1521.)

Lopez found that mere arrests are not admissible because they are more prejudicial than probative. (*Lopez, supra*, 129 Cal.App.4th at pp. 1522-1523.) Most of the misdemeanor convictions that defense counsel failed to object to did not involve moral turpitude and were further not particularly probative of the witnesses' hostility toward police officers simply because of past encounters with them. (*Ibid.*) *Lopez* recognized that the failure to impeach a witness or to object to matters which usually involve tactical decisions by counsel seldom establish an attorney's incompetence and appellate courts should not second-guess trial counsel except in rare cases. (*Lopez, supra*, 129 Cal.App.4th at p. 1523, citing *People v. Frierson* (1979) 25 Cal.3d 142, 158.) *Lopez* found, however, that a criminal defense attorney should be on guard against improper impeachment of his or her own witnesses and further that the deficiency was prejudicial because two of the defense witnesses had divergent observations from those of the police officers of Lopez's encounter with them. (*Lopez, supra*, 129 Cal.App.4th at p. 1524.)

Although the procedural posture of this case is different than *Lopez* because defense counsel is being criticized for failing to impeach the People's witness, we understand Banks's reliance on it. This case is different from *Lopez*, however, because defense counsel here mounted a vigorous attack on Gustavo's character, portraying him as someone who committed regular domestic violence on Banks, as well as working to undermine Gustavo's account of how and why he was attacked. Defense counsel's focus on these points would not have been greatly bolstered by impeaching Gustavo on two misdemeanor theft convictions and could have appeared petty to the jury. Defense counsel had the advantage of observing the jury's reaction to the witnesses, an advantage

we lack on appeal. Impeaching Gustavo for committing theft offenses could have easily highlighted Banks's own conviction for theft which would itself provide a sound tactical reason for not impeaching the witness. (See *People v. Ghent* (1987) 43 Cal.3d 739, 772-773.) Counsel therefore could have had sound tactical reasons for not impeaching Gustavo with misdemeanor theft convictions.

Banks does not challenge the prosecutor's ability under Evidence Code section 1103, subdivision (b) to challenge her character once she opened the door to such a challenge by questioning Gustavo's character. (See *People v. Walton* (1996) 42 Cal.App.4th 1004, 1014-1015, overruled on another ground in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3.) Banks asserts her defense counsel was ineffective for failing to lodge an Evidence Code section 352 objection to the prosecutor's questions about the robbery because it was remote in time and more prejudicial than probative. The People respond that such an objection would have been futile here. We agree.

The prosecutor began this line of questioning by asking Banks if she regularly kept a knife in her purse and whether it was accessible so she could use it quickly. Banks replied affirmatively to both questions. Defense counsel objected when the prosecutor asked her if she had ever had occasion to pull the knife out quickly. The court overruled the objection. Banks admitted she had to pull a knife on someone in the past. When the prosecutor asked Banks if she ever stabbed anyone before, she replied that she did when she was young. Defense counsel objected to this question but the trial court sustained the objection only on the basis of the form of the question. The prosecutor argued the question was valid on the question of defendant's character under Evidence Code section 1103. The court asked the prosecutor to rephrase the question.

When the prosecutor asked Banks how the prior incident began, she replied that she was committing a crime. When the prosecutor asked Banks to elaborate on the details, defense counsel objected on the ground the question called for a narrative. The trial court overruled the objection, stating that they had "to get something. I'll overrule."

Banks admitted that when she was 18 years old, she stabbed a clerk during a robbery and she was not acting in self-defense.

The trial court appeared to be determined to let the prosecutor pursue Banks's prior conviction for robbery because they had "to get something." Two of defense counsel's objections in this regard were overruled, and it appears any further objections would also have been overruled. Attorneys are not required to make futile objections. (*People v. Anderson* (2001) 25 Cal.4th 543, 587.)

Prejudice

Assuming defense counsel was ineffective for failing to impeach Gustavo with two misdemeanor convictions and for failing to make an Evidence Code section 352 objection to questions surrounding Banks's prior conviction for robbery, any deficiency was not prejudicial.

Although she denied it, the evidence presented at trial from several other witnesses was that Banks fled the scene soon after Lugo arrived. Flight from the scene of the crime can demonstrate consciousness of guilt. (*People v. Anderson* (2018) 5 Cal.5th 372, 391-392.) Banks had conversations from jail with her daughter-in-law instructing her to tell "certain people" not to come to court. Banks tried to explain this away during her testimony, but this also evidenced her consciousness of guilt. (*People v. Alexander* (2010) 49 Cal.4th 846, 921-922 [evidence that a defendant attempted to dissuade a witness from testifying or to falsely testify tends to show consciousness of guilt and justifies jury instruction]; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 102 [same].)

During questioning by investigators, Banks did not assert that Gustavo choked her prior to the stabbing. Lugo testified that he did not see any injuries on Banks's neck and she did not have a hoarse voice associated with being choked. Although Banks admitted to Lugo during questioning that the knife found by an officer was hers, at trial she testified the knife was not hers. Further, Banks failed to report that she lost

consciousness as a result of allegedly being choked by Gustavo. During questioning, Banks said she stabbed Gustavo because he hit her in the face. Banks later testified that she stabbed Gustavo because he was trying to hit her with an abandoned sink in the alley. Although A.S. corroborated some aspects of Banks's account — such as the verbal argument, Gustavo's anger, and Gustavo grabbing at her arm — A.S. did not see Gustavo holding a sink.

There was no disagreement that Banks stabbed Gustavo. Each witness gave different accounts of how their dispute began and whether or not Gustavo choked Banks, threatened her life by hitting her with a sink, or hit her in the face with his fist. Even if Gustavo tried to hit Banks with the sink, Lugo described it as being made of plastic and very light. Gustavo's account of events was consistent while Banks gave varying stories, often missing key details, about how she was acting in self-defense.⁶ Some of Banks's statements were inconsistent with her claim of self-defense. The physical evidence, including observations of Banks's neck, were inconsistent with her claim that she was choked. Banks was not a credible witness on her own behalf. Banks has failed to demonstrate she was prejudiced by counsel's alleged shortcomings in her representation and has not met the second prong necessary to a showing of ineffective representation.

⁶ On the issue of whether the failure of defense counsel to lodge an Evidence Code section 352 objection to Banks's robbery conviction was prejudicial, Banks argues the trial court could well have excluded reference to it because the trial court exercised its discretion pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 to not use the prior serious felony as a strike. The same robbery conviction was also charged as prior serious felony enhancement and the court did use it to increase Banks's sentence by five years. This record does not establish the trial court would have granted a motion to exclude the conviction pursuant to Evidence Code section 352 or that it was disinclined to apply the enhancement to Banks's sentence.

Motion for New Trial

Introduction

Defense counsel filed a motion for new trial including a declaration from Gustavo in which he stated that district attorney investigators instructed him not to speak to anyone about the case except for them. Defense counsel filed a declaration stating that Gustavo actually spoke with the defense investigator. Defense counsel argued that Gustavo's declaration that he was instructed not to speak to anyone but investigators for the district attorney was a lie. Defense counsel described Gustavo's declaration as a perfect illustration of "the plasticity of his understanding of what is the truth."

At the hearing on the motion for new trial, defense counsel argued that either the government was impeding the investigation by telling Gustavo not to talk to defense investigators, or Gustavo was lying under oath in his declaration. Defense counsel believed this showed that Gustavo "will lie at the drop of a hat." The prosecutor argued that Gustavo's statement was the result of a misunderstanding of what district attorney's investigators told him due to his inability to read or understand English well.

Defense counsel replied he did not believe for one minute that any investigator from the district attorney's office told Gustavo not to speak to the defense but that Gustavo was lying and Banks was entitled to a new trial. The trial court denied the motion for new trial finding that the newly discovered evidence only provided a basis to impeach a witness.

Banks contends the trial court erred in denying her motion for new trial because the newly discovered evidence undermined Gustavo as the People's primary witness.

Analysis

Under section 1181, subdivision (8), a trial court may grant a new trial motion "[w]hen new evidence is discovered material to the defendant, and which he [or she] could not, with reasonable diligence, have discovered and produced at the trial." The determination of a motion for new trial rests so completely within the trial court's

discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears. In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: (1) that the evidence, and not just its materiality, be newly discovered; (2) that the evidence be not merely cumulative; (3) that it be enough to make probable a completely different result on a retrial; (4) that the party could not with reasonable diligence have discovered and produced it at trial; and (5) that these facts be shown by the best evidence of which the case admits. (*People v. Howard* (2010) 51 Cal.4th 15, 42-43, citing *People v. Delgado* (1993) 5 Cal.4th 312, 328.)

A motion for new trial should be granted when the newly discovered evidence contradicts the strongest evidence introduced against the defendant. (*People v. Hall* (2010) 187 Cal.App.4th 282, 298 (*Hall*).) Critically, a motion for new trial on the ground of newly discovered evidence is not granted where the only value of the evidence is as impeaching evidence or to contradict an opposing party's witness. (*Id.* at p. 299.) Prejudice can be shown if the defendant has shown that a single juror's mind could be changed, leading to a hung jury. (*People v. Soojian* (2010) 190 Cal.App.4th 491, 520-521.)

Banks's motion for new trial was based on her allegation that Gustavo filed a declaration with a lie about whether investigators for the district attorney told him not to speak to anyone about the case except for them. Banks surmises from this that Gustavo was a liar because he was not actually told this by the prosecutor's investigators. Although Gustavo's statement could be interpreted in this fashion, it could also be seen, as argued by the prosecutor, as a simple misunderstanding or miscommunication. Gustavo appeared during the trial to struggle in his communication even with a Spanish language interpreter.

Furthermore, the strongest evidence for the People did not rest solely on Gustavo's description of events. The evidence showed that he was stabbed by Banks and the knife

found in a yard adjacent to the alley belonged to her. A.S. independently established that the two were arguing prior to the stabbing and, although he initially thought Gustavo was the aggressor, he realized that Gustavo had been stabbed by Banks. No physical evidence at the scene or on Banks's person corroborated her self-defense story. Also, Banks's flight from the scene and request from jail to her daughter-in-law to get Gustavo not to testify evidenced a consciousness of guilt. If the "newly" discovered evidence has any value to Banks at all, it tends, given the most generous interpretation possible, to impeach Gustavo. Impeaching evidence is insufficient by itself to justify granting a motion for new trial.

As for the possibility that this evidence could have changed a single juror's mind toward acquittal, we find this improbable. The jury began its deliberations at 3:17 p.m. on March 15, 2016, and returned its verdicts on all three counts at 4:32 p.m. the same day. Jury deliberations took only one hour and fifteen minutes. Banks has failed to show that her newly discovered evidence was of such strength as to undermine confidence in the verdict, leading to a completely different result on retrial.

Prior Serious Felony Enhancement

The trial court enhanced Banks's sentence by five years pursuant to section 667, subdivision (a). The court lacked the discretion to do otherwise at the time of sentencing.⁷ As the applicable statutes then read, the court was required to impose a five-year consecutive term upon "any person convicted of a serious felony who previously ha[d] been convicted of a serious felony" (former § 667, subd. (a)(1)), and it had no authority "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under [s]ection 667" (former § 1385, subd. (b)).

⁷ On the eve of trial, the People offered Banks a plea bargain to a substantially lesser sentence than the one imposed by the trial court. The plea bargain did not include a sentence for the prior prison term enhancement.

Senate Bill No. 1393 has removed these restrictions on the trial court's discretion to strike this enhancement, effective January 1, 2019. (Stats. 2018, ch. 1013, §§ 1, 2.) As appellant's case is not yet final, the People concede the amendments to sections 667, subdivision (a) and 1385, subdivision (b) apply, and remand is required.

DISPOSITION

The matter is remanded for trial court to exercise its discretion and to consider striking appellant's prior serious felony enhancement. (Pen. Code, § 667, subd. (a).) The judgment is otherwise affirmed.

SNAUFFER, J.

WE CONCUR:

DETJEN, Acting P.J.

PEÑA, J.